STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

LaFONTAINE SALINE, INC., d/b/a LaFONTAINE CHRYSLER JEEP DODGE RAM,	Docket No. 146722
Plaintiff-Appellee,	Court of Appeals No: 307148
vs.	Washtenaw County Circuit Court Case No: 10-001329-CZ
CHRYSLER GROUP, LLC, and IHS AUTOMOTIVE GROUP, LLC d/b/a CHRYSLER JEEP OF ANN ARBOR,	
Defendants-Appellants.	

BRIEF ON APPEAL OF DEFENDANT-APPELLANT CHRYSLER GROUP

ORAL ARGUMENT REQUESTED

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Jill M. Wheaton (P49921)
Thomas S. Bishoff (P53753)
Dykema Gossett PLLC
2723 South State Street, Ste. 400
Ann Arbor, MI 48104
(734) 214-7629
Attorneys for Defendant-Appellant Chrysler Group LLC

Robert D. Cultice
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Of Counsel for Chrysler Group, LLC

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STATEMENT OF JURISDICTION

Defendant-Appellant Chrysler Group LLC ("Chrysler Group") appeals the November 27, 2012 Opinion of the Michigan Court of Appeals, which reversed a September 16, 2011 Washtenaw County Circuit Court order granting summary disposition to Chrysler Group and co-defendant IHS Automotive Group, LLC d/b/a Chrysler Jeep of Ann Arbor ("IHS"). (The Court of Appeals' decision is attached as Appellants' Appendix (filed jointly in this case and Docket No. 146724) ("AA") 183a-190a; the Circuit Court's Opinion and Order is attached as AA 151a-157a.) Both Chrysler Group and IHS filed timely applications for leave to appeal to this Court. On October 2, 2013, this Court granted both applications. Therefore, this Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTION PRESENTED FOR REVIEW

I. This case involves whether an August 4, 2010 amendment (the "2010 Amendment") to the Regulation of Motor Vehicle Manufacturers, Distributors, Wholesalers and Dealers Act (the "Dealer Act") can be applied retroactively to pre-existing contracts where:

a. statutory amendments are presumed to operate only prospectively absent a clearly manifested intent to the contrary by the Legislature, and there is no language in the 2010 Amendment suggesting a legislative intent to have it applied retroactively; and

b.. the application of the 2010 Amendment deprives Chrysler Group of vested rights under its pre-existing contract with Plaintiff LaFontaine Saline, Inc., d/b/a LaFontaine Chrysler Jeep Dodge Ram ("LaFontaine"); deprives Chrysler Group and IHS of their vested rights under a pre-existing Letter of Intent; imposes new obligations on Chrysler Group; grants new substantive rights to LaFontaine; and violates the contracts clauses of the state and federal constitutions?

Plaintiff would answer: Yes
Chrysler Group answers: No
The Circuit Court would answer: No
The Court of Appeals would answer: Yes
This Court should answer: No

INTRODUCTION

The Dealer Act grants an existing automotive dealer the right to sue a manufacturer proposing to establish an additional like-line dealer and seek to prohibit that establishment, provided that the existing dealer is located within the "relevant market area" ("RMA") of the proposed addition. The Dealer Act in effect in 2007, when Chrysler Group and LaFontaine entered into a Dodge Sales and Service Agreement (the "LaFontaine Dodge Agreement"), defined the RMA as the area within a six-mile radius of the proposed additional dealer. The same six-mile RMA was in effect in February, 2010 when Chrysler Group entered into a binding Letter of Intent ("LOI") with IHS providing for the establishment of the Dodge vehicle line at IHS's existing Chrysler and Jeep dealership in Ann Arbor. As of the dates that the LaFontaine Dodge Agreement and the LOI were executed, there was no Dodge dealer within a six-mile radius of IHS and therefore, no like-like dealer had standing to challenge the proposed establishment. In August, 2010, however, the Legislature amended the Dealer Act to enlarge the RMA from a six-mile radius to a nine-mile radius. Following the 2010 Amendment, LaFontaine filed suit against Chrysler Group and IHS seeking to block the establishment of the Dodge line at IHS. LaFontaine contended that it had standing to sue under the Dealer Act because it is located within the new nine-mile RMA enacted by the 2010 Amendment, even though it is not located within the six-mile RMA in effect when the LaFontaine Dodge Agreement and LOI were executed.

The Circuit Court granted summary disposition to Chrysler Group and IHS on the grounds that, *inter alia*, the 2010 Amendment could only be applied prospectively, not retroactively. The court adopted Chrysler Group's argument that to apply the statute to allow LaFontaine to sue would deprive Chrysler Group of its vested legal rights under two pre-existing contracts, the LaFontaine Dodge Agreement effective as of September 24, 2007, and the

February 2, 2010 LOI. The Court of Appeals reversed in an opinion that nowhere addressed the issue of impermissible retroactive application of a statutory amendment. (Indeed, the Court of Appeals' only mention of the issue was an observation that LaFontaine was not seeking retroactive application.)

Statutory amendments are presumed to operate prospectively only, and not retroactively, absent a clear indication by the Legislature to the contrary. Here, there is no suggestion anywhere in the 2010 Amendment that it was meant to apply retroactively. In addition, retroactive application is particularly inappropriate where such application would impair vested rights or impose new duties. Yet applying the 2010 Amendment to grant LaFontaine standing to sue impairs Chrysler Group's rights under both its bargained for contract with LaFontaine and its LOI with IHS, and imposes new duties on Chrysler Group in connection with this proposed establishment. For all of these reasons as well, retroactive application of the 2010 Amendment violates the provisions in the United States and Michigan Constitutions that prohibit laws that impair contracts. The Court of Appeals erred and this Court should reverse.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

A. Relevant Dealer Act Provisions.

The Dealer Act, MCL 445.1561 *et. seq.*, governs the franchise relationship between automotive manufacturers and dealers in a number of ways, including when a manufacturer proposes to establish an additional vehicle line within a "relevant market area" that already includes an existing dealer of the same line-make. *See* MCL 445.1576 (2)-(3). Specifically, before a manufacturer enters into a dealer agreement establishing a new motor vehicle dealer, it is required to give written notice of its intention to each dealer of the same line make in the RMA

of the proposed new dealer. MCL 445.1576(2).[1] The existing dealer of the same line-make may then challenge the proposed establishment by filing a declaratory judgment action in Circuit Court to determine whether "good cause" exists for the proposed additional vehicle line. MCL 445.1576(3). Upon the filing of the declaratory judgment action, Section 445.1576(3) imposes an automatic stay of the proposed establishment pending the resolution of the lawsuit, and perhaps longer if the manufacturer is unable to demonstrate "good cause" under the Dealer Act for the establishment.

"Relevant market area" ("RMA") is defined in the Dealer Act. When the Dealer Act was first passed in 1981, the term "relevant market area" was defined, for counties with populations of over 25,000, as the area within six miles of the intended site of the proposed dealer, with the distance determined by measuring "the most direct street or highway route from the intended site". 1981 PA 118, Sec. 6(a)(b). Two years later, in 1983, the Act was amended, *inter alia*, to change the definition of "relevant market area" to a six-mile radius from the intended site of the proposed dealer for counties with populations over 25,000. 1983 PA 188, Sec. 6(a), codified as MCL 445.1566(1)(a). That definition remained in effect for 27 years, until the 2010 Amendments to the Act changed, among other things, the definition of RMA. Under the 2010 Amendment, "relevant market area" is defined, for counties with a population over 150,000 (Washtenaw, the county at issue, has a population of over 150,000), as the area within a nine-mile radius of the proposed dealer's location. 2010 PA 139, Sec. 6a, codified at MCL

[1] MCL 445.1576(2) provides, "[b]efore a manufacturer or distributor enters into a dealer agreement establishing or relocating a new motor vehicle dealer within a relevant market area where the same line is represented, the manufacturer or distributor shall give written notice to each new motor vehicle dealer of the same line make in the relevant market area of its intention to establish an additional dealer or to relocate an existing dealer within that relevant market area."

445.1566(1)(a).[2] The Act was "ordered to take immediate effect "and has an effective date of August 4, 2010. 2010 PA 139. It is undisputed that LaFontaine is located more than six miles, but less than nine miles, from the IHS location in Ann Arbor where Chrysler Group proposes to add the Dodge vehicle line.

B. The LaFontaine Dodge Agreement.

Chrysler Group and LaFontaine are parties to a Chrysler Sales and Service Agreement, a Jeep Sale and Service Agreement and a Dodge Sales and Service Agreement, all of which were effective as of September 24, 2007. (Collectively "LaFontaine Dealer Agreements"). Each of the LaFontaine Dealer Agreements contains essentially identical provisions. (A copy of the LaFontaine Dodge Agreement is attached at AA 48a-51a.)[3]

Chrysler Group granted LaFontaine, in the LaFontaine Dodge Agreement, the "non-exclusive right" to purchase Dodge vehicles from Chrysler Group and display and resell them at retail from LaFontaine's location and facility at 900 W. Michigan Avenue in Saline. (LaFontaine Dodge Agreement, ¶4, AA 49a.) The LaFontaine Dodge Agreement obligates LaFontaine to actively and effectively sell and promote the retail sale of Dodge vehicles in its "Sales Locality", which is defined as the "area designated in writing to [LaFontaine] by

[2] Specifically, prior to, the 2010 amendment, MCL 445.1566(1)(a) provided, in pertinent part: "'Relevant market area' means: (a) For a proposed new motor vehicle dealer or a new motor vehicle dealer who plans to relocate his or her place of business in a county having a population which is greater than 25,000, the area within a radius of 6 miles of the intended site of the proposed relocated dealer...." 1993 PA 188, Sec. 6(a). It now reads: "'Relevant market area' means 1 of the following: (a) In a county that has a population of more than 150,000, the area within a radius of 9 miles of the site of the intended place of business of a proposed new vehicle dealer or the intended place of business of a new vehicle dealer that plans to relocate its place of business. (b) In a county that has a population of 150,000 or fewer, the area within a radius of 15 miles of the site of the intended place of business of a proposed new vehicle dealer...." 2010 PA 139, Sec. 6(a), codified as MCL 445.1566(1)(a).

[3] Because Chrysler Group is seeking to establish only the Dodge vehicle line at HIS (which already sells and services the Chrysler and Jeep lines), the LaFontaine Dodge Agreement is the only relevant agreement among the LaFontaine Dealer Agreements.

[Chrysler Group] from time to time as the territory of [its] responsibility for the sale of [Dodge vehicles, parts and accessories]." (*Id.*) The LaFontaine Dodge Agreement provides that "said Sales Locality may be shared with other [Chrysler Group] dealers of the same line-make as [Chrysler Group] determines to be appropriate." (*Id.*)

C. The LOI Agreement.

IHS is an existing dealer that sells and services Chrysler and Jeep vehicles from its approved location and facility in Ann Arbor. IHS desires to add the Dodge line to its facility so that it, like LaFontaine, can sell the Chrysler, Jeep, and Dodge lines. To this end, Chrysler Group and IHS entered into an "LOI [Letter of Intent] To Add Vehicle Line" (the "LOI") as of February 2, 2010 (attached as AA 61a-64a.). In the LOI, IHS offered to enter into a Dodge Sales and Service Agreement with Chrysler Group authorizing IHS to sell and service Dodge vehicles at IHS's existing location and facility at 2060 West Stadium Boulevard in Ann Arbor (the "IHS Location"). Chrysler Group accepted IHS's offer subject to its timely performance of the LOI's requirements.

IHS agreed to a number of specific terms relating to the display, sales and service of Dodge vehicles, including the expansion and renovation of the existing IHS Chrysler and Jeep dealership facility to accommodate the Dodge vehicle line and satisfaction of Chrysler Group's financial requirements. The LOI also contains detailed facility requirements, including square footage for the land area, buildings, showroom and service department, and obligated IHS to begin construction within 90 days of Chrysler Group's approval of the plans and specifications. (*Id.*, ¶¶ 3-4, AA 62a.) It is undisputed that as of February 2, 2010, when the LOI was signed, there were no existing Dodge dealers within a six-mile radius of the proposed IHS Location. It is also undisputed that LaFontaine is within a nine-mile radius of the proposed IHS Location. After

signing the LOI, IHS began to perform under the requirements of the LOI. (July 27, 2011 Transcript, p. 20, AA 145a.)

D. Complaint and Grant of Summary Disposition.

On December 9, 2010, after the 2010 Amendment was enacted, LaFontaine filed a Complaint (later Amended) against Chrysler Group and IHS under the Dealer Act seeking declaratory and equitable relief prohibiting Chrysler Group from establishing the Dodge vehicle line at the IHS location. (First Amended Complaint, AA 18a-28a.) LaFontaine alleged, *inter alia*, that it had standing to sue because it was located within the nine-mile RMA enacted by the 2010 Amendment and was therefore entitled under Section 445.1576(3) of the Dealer Act to "a determination by the [circuit court] of whether good cause exists for the action proposed or taken by Chrysler Group." (*Id.*, ¶ 13, see also ¶¶7, 9, AA 19a-20a.)

Chrysler Group moved for summary disposition under MCR 2.116(C)(8) and (10) based on LaFontaine's lack of standing under the six-mile RMA in effect at the time Chrysler Group and LaFontaine entered into the LaFontaine Dodge Agreement, and Chrysler Group and IHS entered into the LOI. Chrysler Group argued that the nine-mile RMA created by the 2010 Amendment could not be applied retroactively to Chrysler Group's (i) September 24, 2007 LaFontaine Dodge Agreement or (ii) February 2, 2010 LOI with IHS, without impermissibly depriving Chrysler Group of its rights under each of those pre-existing contracts and the law in effect at the time those contracts were executed. (Chrysler Group's Motion for Summary Disposition.)[4] IHS also moved for summary disposition. LaFontaine opposed these dispositive

[4] The Court of Appeals' statement that Chrysler Group argued in the Circuit Court that the "LOI constituted a 'dealer agreement' that was effectuated before the 2010 statutory amendment...." (Court of Appeals Opinion, p. 3, AA 185a) is incorrect. Chrysler Group has never argued that the LOI constitutes a "dealer agreement", rather, it has always argued that the LOI is not a "dealer agreement", but an independent contract that precedes a dealer agreement.

motions arguing, *inter alia,* that the LOI was not a dealer agreement, but instead merely a "preliminary agreement", therefore, the 2010 Amendment enlarging the RMA was not being applied retroactively because no dealer agreement between Chrysler Group and IHS was in effect prior to the effective date of the 2010 Amendment. (Plaintiff's Opposition to Defendants' Motions.) Chrysler filed a reply brief. (Chrysler Group's Reply Brief in Support of its Motion for Summary Disposition.)

The Circuit Court granted defendants' motions. The court ruled that "the [2010 Amendment] should apply prospectively only" emphasizing that "generally, statutory amendments are presumed to operate prospectively." (Circuit Court Opinion, p. 6, AA 156a.) The Circuit Court also found that the language used by the Legislature in the 2010 Amendment did not provide for retroactive application, relying on the Legislature's setting of a "future, immediate effective date of August 4, 2010 and [omission of] any reference to retroactivity of the 2010 amendments". (*Id.*, p. 7, AA 157a) The Circuit Court underscored that "established law holds that 'providing a specific, future effective date and omitting any reference to retroactivity' supports a conclusion that a statute should be applied prospectively only." (*Id.*, quoting *White v General Motors Corp*, 431 Mich 387, 398-99; 429 NW2d 576 (1988) and citing *Brewer v AD Transp Exp Inc*, 486 Mich 50; 782 NW2d 475 (2010)). The Circuit Court concluded, "for the reasons set forth in Defendants' Brief, on the record, and in the Court's Order, Defendants' Motion for Summary Disposition is GRANTED, and plaintiff's complaint is DISMISSED." (*Id.*)[5]

[5] The Circuit Court also found that the LOI is "the operative dealer agreement" and based on that, the 2010 Amendment is not applicable because the LOI was signed before the 2010 Amendment was enacted. (Circuit Court Opinion, p. 6, AA 156a.)

LaFontaine moved for reconsideration, which was denied. (October 28, 2011 Order Denying Motion for Reconsideration, AA 180a-182a.)

E. Court of Appeals' Opinion.

LaFontaine appealed. The Court of Appeals (Judges Borello, Fitzgerald and Owens), in a published decision, reversed the grant of summary disposition in favor of Chrysler Group and IHS and remanded the case to the Circuit Court for further proceedings. The Court of Appeals devoted one sentence to the retroactive application issue:

> Because [LaFontaine] does not argue for retroactive application of [the 2010 Amendment], the central issue in this case is whether the LOI is a 'dealer agreement' under the MDA. If the LOI is a binding dealer agreement, then the six-mile radius applies and plaintiff lacks standing under MCL 445.1576(3) because the LOI was signed prior to the effective date of [the 2010 Amendment]. However, if the LOI is not a dealer agreement then the nine-mile radius applies and plaintiff has standing under MCL 445.1576(3) because any dealer agreement between Chrysler and IHS will necessarily be executed after the effective date of the amendment. (Court of Appeals Opinion, p. 5, AA 187a.) (Emphasis added.)

The Court of Appeals then ruled that because the LOI "does not purport to establish the legal rights and obligations regarding the sale of new motor vehicles and accessories" it is not a "dealer agreement" as defined by the Dealer Act,[6] and therefore concluded that "any future dealer agreement between Chrysler and [IHS] will necessarily be executed after 2010 PA 139 took effect; thus, [LaFontaine] is located within the 'relevant market area' and plaintiff can maintain an action under MCL 445.1576(3) to determine whether good cause exists to establish the proposed Dodge vehicle line at IHS." (*Id.*, p. 6, AA 188a.)

[6] Dealer agreement is defined in the Act as "an agreement or contract in writing between a distributor and a new motor vehicle dealer, between a manufacturer and a distributor or a new motor vehicle dealer, or between an importer and a distributor or a new motor vehicle dealer, that purports to establish the legal rights and obligations of the parties to the agreement or contract and under which the dealer purchases and resells new motor vehicles and conducts service operations...." MCL 445.1562(3).

Chrysler Group and IHS filed motions for reconsideration arguing that the Court of Appeals had missed the point of their primary arguments regarding impermissible retroactive application of the 2010 Amendment. The Court denied these motions in a one-line order. (Jan. 11, 2013 Order of Court of Appeals, AA 191a).

After the Court of Appeals issued its decision, the United States Court of Appeals for the Sixth Circuit (Judges McKeague, Siler, and Sutton) issued a published opinion holding that, under Michigan law, the 2010 Amendment cannot be applied retroactively to deprive a manufacturer of the vested right under a pre-existing dealer agreement to establish a like-line dealer wherever the manufacturer deemed appropriate, provided that the manufacturer complied with the six-mile RMA in effect at the time the dealer agreement was signed. *Kia Motors America, Inc v Glassman Oldsmobile Saab Hyundai, Inc*, 706 F3d 733 (CA 6, 2013). In affirming the federal district court's grant of judgment on the pleadings, the Sixth Circuit accepted the same arguments that Chrysler Group and IHS made in this case.

F. This Court Grants Leave to Appeal

Both Chrysler Group and IHS filed applications for leave to appeal to this Court.[7] On October 2, 2013 the Court granted both applications and directed the parties to address "whether the Court of Appeals erred in holding that the 2010 PA 139 definition of 'relevant market area', MCL 445.1566(1)(a), applied to enable the plaintiff to challenge the future dealer agreement between the defendants under MCL 445.1576(3). Compare *Kia Motors America, Inc. v Glassman Oldsmobile Saab Hyundai, Inc.*, 706 F3d 733, 735(CA 6, 2013)."

[7] The IHS Application was given Docket No. 146724.

SUMMARY OF ARGUMENT

The law of this state is clear – statutes are presumed to operate only prospectively unless a contrary intent is clearly manifested, and this principle is especially true "if retroactive application of a statute would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past transactions." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). This longstanding legal principle was confirmed as recently as 2012 when this Court reiterated that the presumption in favor of prospective application is "especially true when giving a statute retroactive operation will ... create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed." *Johnson v Pastoriza*, 491 Mich 417, 429-30; 818 NW2d 279 (2012) (cites omitted).

Chrysler Group had the indisputable right—well before the enactment of the 2010 Amendment—to establish the Dodge vehicle line at the IHS Location, and LaFontaine had no right to sue Chrysler Group under the Dealer Act to seek to enjoin the proposed establishment. Chrysler Group's right was 1) expressly agreed to by LaFontaine in the non-exclusive LaFontaine Dealer Agreement signed by LaFontaine in 2007, which permits Chrysler Group to establish additional Dodge dealers wherever it deems appropriate, and 2) explicitly permitted under the six-mile RMA in effect when the LaFontaine Dodge Agreement was signed. This was the bargain that Chrysler Group and LaFontaine agreed to. This was the state of the law at the time the LaFontaine Dealer Agreement was entered, and at the time Chrysler Group and IHS entered into the LOI.

It was only after the 2010 Amendment was enacted, enlarging the RMA to a nine-mile radius, that LaFontaine claimed the right under the Dealer Act to sue to stop the proposed addition of the Dodge vehicle line at the IHS Location. In other words, LaFontaine sought to

take advantage of the 2010 Amendment to expand the territorial protections beyond the rights provided in its contract with Chrysler Group and beyond the law in effect at the time that contract was executed. By permitting LaFontaine to take advantage of the nine-mile RMA, enacted almost three years after the LaFontaine Dodge Dealer Agreement was signed, the Court of Appeals engaged in a classic case of impermissible retroactive application. The Court of Appeals created a legal right for LaFontaine that did not exist before the 2010 Amendment; contravened the vested legal rights of Chrysler Group and IHS under contracts that pre-existed the 2010 Amendment and the six-mile RMA in effect at the time those contracts were entered into; and imposed new and substantive obligations on Chrysler Group that it did not have prior to the 2010 Amendment. This substantial departure from well-settled law was error and this Court should reverse.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the Court of Appeals' ruling *de novo*, as that is the standard of review for both rulings on motions for summary disposition and issues of statutory interpretation. *See, eg, Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007); *DaimlerChrysler Corp v G Tech Professional Staffing, Inc*, 260 Mich App 183, 184-85; 678 NW2d 647 (2003); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

II. THE COURT OF APPEALS ERRED WHEN IT FAILED TO FOLLOW WELL-SETTLED MICHIGAN LAW GOVERNING THE IMPERMISSIBLE RETROACTIVE APPLICATION OF A STATUTORY AMENDMENT.

Michigan law is well-settled that statutes and amendments to statutes are presumed to operate only in a prospective manner absent a clearly manifested contrary intent by the Legislature. *Johnson,* 421 Mich at 429; *Lynch,* 463 Mich at 583; *Brewer,* 486 Mich at 56, *Selk v Detroit Plastic Prods*, 419 Mich 1, 9; 345 NW2d 184 (1984). As aptly put by the United States

Supreme Court, the presumption against retroactive application is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v USI Film Prods*, 511 US 244, 264; 114 S Ct 2d 1522; 128 L Ed 2d 229 (1994). This rule is based on the fundamental concept that "settled expectations should not be lightly disrupted." *Id.*, 511 US at 265. This Court underscored its agreement with this long-standing principle in relying on and quoting from *Landgraf* in its seminal *Lynch* decision regarding the impermissible retroactive application of a statute: "a requirement that the Legislature make its intention clear 'helps ensure that [the Legislature] itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.'" 463 Mich at 587, quoting *Landgraf*, 511 US at 268. An impermissible retrospective law is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past." *Hughes v Judges Retirement Bd*, 407 Mich 75, 85; 282 NW2d 160 (1969). This protection is especially important "when a new statutory provision affects contractual rights, an area 'in which predictability and stability are of prime importance.'" *Lynch*, 463 Mich at 587, quoting *Landgraf*, 511 US at 271.

With this presumption in favor of prospective application as a starting point, this Court has developed certain factors that should be considered when addressing the issue of retroactive application: (1) whether there is specific language in the new act or amendment providing for retrospective or prospective application; (2) a statute is not regarded as operating retroactively solely because it relates to an antecedent event; (3) whether retroactive application will take away or impair vested rights acquired under existing laws; create a new obligation and impose a new duty; or attach a new disability with respect to transactions or considerations already past, and; (4) whether a statute can be classified as a remedial or procedural act, in which case there

may be an exception to the presumption against retroactivity. *In re Certified Questions from the United States Court of Appeals for the Sixth Circuit*, 416 Mich 558, 570-71; 331 NW2d 456 (1982). The facts of each case dictate what factors should be considered, and not all factors apply in every case.

The application of these factors to this case demonstrate that the correctness of the Circuit Court's ruling that the 2010 Amendment may be applied only in a prospective manner; not in the erroneous retrospective manner applied by the Court of Appeals, that provides LaFontaine with a new substantive right to file suit under the nine-mile RMA enacted in the 2010 Amendment – a right that did not exist when Chrysler Group and LaFontaine entered into their Dodge Dealer Agreement, or when Chrysler Group and IHS entered into the LOI. LaFontaine lacks standing to challenge the proposed expansion, and the case was properly dismissed.

A. The Language of the 2010 Amendment Does Not Provide for Retroactive Application.

There is no language in the 2010 Amendment manifesting a legislative intent to have the 2010 Amendment applied retroactively. To the contrary, the Legislature explicitly provided that the enactment was "to become effective immediately" and therefore established a future effective date of August 4, 2010. "Providing a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only." *Johnson,* 491 Mich at 432; citing *Brewer,* 486 Mich at 56 (finding that an amendment passed and made effective on a certain date was a "specific future effective date", demonstrating that it should be applied only in a prospective manner); *Pohutski v City of Allen Park*, 465 Mich 675, 698; 641 NW2d 219 (2002) (a law that provided that it was to take "immediate effect" did not contain any language indicating that it was meant to apply retroactively); *Lynch* (finding the Sales Representative Commissions Act could not be applied retroactively where there was no express

language regarding retroactivity, thus indicating the Legislature intended the statute to apply only in a prospective manner). In sum, the 2010 Amendment "contains no language suggesting that this new standard applies to antecedent events or injuries." *Brewer*, 486 Mich at 56.

This absence of any language evidencing an intent to have the 2010 Amendment apply retroactively speaks volumes. As this Court has repeatedly stated, the Legislature "has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively." *Id, see also Lynch,* 463 Mich at 584. Therefore, where – as here – the Legislature has not done so, it is understood to have intended only prospective application. The Legislature had the power to make the 2010 Amendment immediately effective or give it retroactive effect. It chose the former, not the latter. This alone should end the analysis, but there is more. When the Legislature revised different portions of the Dealer Act in 1988[8], it expressly provided that those amendments would "apply to agreements in existence on the effective date of this section and to agreements entered into or renewed after the effective date of this section." 1998 PA 456, codified at MCL 445.1582a. And another provision enacted as part of the 2010 Amendments to the Act (relating to dealers who also sell competing vehicle lines) specifically provides that it applies "if a new motor vehicle dealer is a party to a dealer agreement on the effective date of the amendatory act that added this subdivision." 2010 PA 141, codified at MCL 445.1574(1)(x). It is also significant that other provisions of the Act expressly provide that they apply to pre-existing contracts and trump any language contained therein, namely, MCL 445.1567(1), 445.1567(2), 445.1568, 445.1570, all governing the termination of dealer agreements, and all of which begin with the preface "notwithstanding any agreement,..." Thus, the Legislature knows

[8] These amendments addressed vehicle allocation, limited the dealer's obligation to purchase special tools from a manufacturer, prohibited the requirement that a dealer participate in rebate programs, and generally required approval by the manufacturer of a dealer's proposed changes in executive management absent special circumstances. 1998 PA 456.

how to make statutes or statutory amendments – including provisions of, and amendments to, this very Act – retroactive when it desires to do so.

All of the above should eliminate any argument that the Legislature intended retroactive application the 2010 Amendment. Without such a clear intention, the amendment may only be applied prospectively and the Court of Appeals should be reversed.

B. The Court of Appeals' Retroactive Application Impairs Chrysler Group's Rights and Duties Under Pre-Existing Agreements and the Law In Effect At The Time They Were Executed.

The presumption in favor of prospective application of a statutory amendment applies with particular force—and retroactive application is therefore especially inappropriate—where retroactive application would impair vested rights, or create new obligations and impose new duties. *Lynch*, 463 Mich at 584; *In re Certified Questions* 416 Mich at 571. In addition, the presumption "is especially true when giving a statute retroactive operation will...create a new liability in connection with a past transaction or invalidate a defense which was good when the statute was passed." *Johnson*, 491 Mich at 429 (cites omitted). And this Court has emphasized that the predictability and stability embodied in the presumption of prospective application is of "prime importance" when contract rights are at issue. *Lynch*, 463 Mich at 587; *see also Hansen-Snyder Co v General Motors Corp*, 371 Mich 480, 484; 124 NW2d 286 (1963) (prospective only application is "especially true when giving a statute retroactive operation will interfere with an existing contract....").

Thus, the third factor in the *In re Certified Questions* regarding the deprivation of vested rights under a pre-existing contract is particularly important here, and provides a perfect lens through which to view the Court of Appeals' error. The Court of Appeals' opinion, if not reversed, will: 1) deprive Chrysler Group of the vested right to establish the Dodge line at the IHS location, which Chrysler acquired under the LaFontaine Dodge Agreement and the six-mile

RMA in effect at the time the LaFontaine Dodge Agreement was signed; 2) deprive both Chrysler Group and IHS of their vested rights to enter into a Dodge dealer agreement subject to IHS's performance of the terms of the LOI; 3) impose new liabilities on Chrysler Group in connection with two past transactions (the Dodge Dealer Agreement and the LOI) in that Chrysler Group will only be allowed to proceed with the establishment of the Dodge line at the IHS Location if it is able to meet the demanding "good cause" standard after expensive and time-consuming litigation; and 4) confers a new and substantive right on LaFontaine by granting it the right to seek to block the establishment of the Dodge vehicle line at IHS, a right that LaFontaine does not have under the LaFontaine Dodge Agreement and did not have under the six-mile RMA in effect at the time the LaFontaine Dodge Agreement was signed.

Put another way, as of the date Chrysler Group and LaFontaine entered into the LaFontaine Dodge Agreement in September 2007, Chrysler Group had the contractual right to add Dodge dealerships where it deemed appropriate, subject only to the six-mile RMA provision of the Dealer Act then in effect. Accordingly, because LaFontaine was located outside of the six-mile RMA, Chrysler Group had the right under its contract with LaFontaine to add the Dodge vehicle line at the IHS location without providing notice to LaFontaine and without the fear of a lawsuit by LaFontaine seeking to block that addition. Chrysler Group and IHS proceeded with that understanding. Chrysler's valuable contract right is severely limited, if not altogether destroyed, by the retroactive application of the nine-mile RMA created by the 2010 Amendment.

Nowhere in its Opinion did the Court of Appeals indicate that it considered the retroactive application analysis factors identified by this Court, particularly Chrysler Group's loss of valuable, bargained-for rights under pre-existing contracts. Nor did the Court of Appeals appreciate that its decision resulted in the very type of retroactive application of a statute that this

Court has consistently held to be improper. In contrast, the Sixth Circuit in *Kia Motors* did understand the unfair prejudice that would be inflicted on manufacturers like Chrysler Group if the nine-mile RMA enacted in the 2010 Amendment was applied retroactively to pre-existing dealer agreements. In that case, Kia Motors entered into a dealer agreement with Glassman Oldsmobile Saab Hyundai ("Glassman") in 1998, which granted a non-exclusive right to Glassman to sell Kia vehicles. In 1998, when the dealer agreement between Kia and Glassman was executed, the Dealer Act defined the RMA as a six-mile radius. In August 2010, Kia informed Glassman of its intention to establish a new dealership within nine miles (but not within six miles) of Glassman's dealership and Glassman objected based on the 2010 Amendment. Kia brought suit in the United States District Court for the Eastern District of Michigan seeking a declaratory judgment that the 2010 Amendment could not be applied retroactively to allow Glassman to protest the expansion. The parties filed cross motions for summary judgment and the district court granted Kia's motion and denied Glassman's. The district court held, *inter alia*, that the 2010 Amendment could not be applied retroactively to adversely affect rights under a pre-existing dealer agreement. The court also noted there was no manifestation of legislative intent to have the 2010 Amendment apply retroactively.

Glassman appealed and the Sixth Circuit affirmed, citing *Lynch* and *Brewer* and emphasizing that there is "no clear legislative intent that the [2010] Amendment should be applied retroactively." 706 F3d at 740. The court rejected the same erroneous argument made in this case by LaFontaine and which the Court of Appeals found persuasive – that retroactivity was not an issue because the additional Dodge dealer would ultimately be established after the 2010 Amendment went into effect and therefore the 2010 Amendment would be applied only in a prospective manner. The Sixth Circuit correctly held that this argument "ignores the fact that the

Amendment affects [the manufacturer's] rights under a contract that predates the Amendment...." *Id.* And the Sixth Circuit correctly emphasized that "to require [the manufacturer] to comply with the 2010 Amendment would clearly require us to apply the Amendment retroactively because it would take away [the manufacturer's] previously unrestricted contractual right to establish a new dealer more than 6 miles from [the existing like-line dealer]." *Id.* at 740-41. Retroactivity is the critical and dispositive issue both in *Kia Motors* and the current case. It should have been addressed by the Court of Appeals, and once the issue is addressed, prevailing Michigan law dictates the dismissal of LaFontaine's claims.[9]

Chrysler Group and LaFontaine—just like the manufacturer and dealer in *Kia Motors*—entered into a dealer agreement *before the effective date of the 2010 Amendment.* In both cases these dealer agreements were specifically non-exclusive. It was uncontested in *Kia Motors*, and is uncontested here, that as of the effective date of these pre-existing dealer agreements, the RMA was defined as a six-mile radius and both the protesting dealer in *Kia Motors* and LaFontaine are located outside of this RMA. And just like in *Kia Motors*, Chrysler Group's contractual and statutory right to establish additional dealers located outside of the six-mile RMA will be severely limited, if not eliminated altogether, if the nine-mile RMA is applied retroactively to the pre-existing dealer agreements.

[9] The Sixth Circuit also correctly noted in *Kia Motors* that "it is a generally accepted rule of construction that 'changes in the law subsequent to the execution of a contract are not deemed to become part of [the] agreement unless its language clearly indicates such to have been [the] intention of [the] parties.'" 706 F3d. at 738, quoting 11 Richard A. Lord, *Williston on Contracts* § 30:23 (4th ed 1990). The court found no indication in the parties' dealer agreement that they intended to incorporate future changes in the law. Similarly, there is no language in the LaFontaine Dodge Agreement that evidences an intent by the parties to incorporate future changes in the Dealer Act, such as the enlargement of the RMA from six to nine miles enacted by the 2010 Amendment, into the Agreement.

The Sixth Circuit's opinion in *Dale Baker Oldsmobile v Fiat Motors*, 794 F2d 213 (CA 6, 1986) is also instructive, in that it too addressed the issue of retroactive application of a provision of the Dealer Act. There, the dealer and Fiat entered into a dealer agreement in 1980. At that time, MCL 445.521, *et seq.* governed the termination of dealer agreements (the "1978 Act"). In 1981, the Legislature replaced the 1978 Act with the current Dealer Act, MCL 445.1561, *et seq.*, (the "1981 Act"). The 1981 Act provided for substantially more compensation to dealers upon termination of their dealer agreements. In 1983, Fiat notified the plaintiff dealer of the termination of its agreement. The dealer sued for wrongful termination under the 1981 Act, and Fiat moved to dismiss on the grounds that the 1981 Act did not apply to contracts executed prior to that Act's effective date. The district court granted the motion to dismiss, and the Sixth Circuit affirmed, ruling that there was "no doubt that application of [the 1981 Act] would impose substantial new duties on [Fiat] as well as giving [the dealer] substantive rights, neither of which existed by law or contract." 794 F2d at 219.

Like the *Kia Motors* court, the *Dale Baker* court rejected the argument accepted by the Court of Appeals here, that is, that the manufacturer had no vested rights that were impaired by the 1981 Act because the intended action (there, the termination; here, the dealer expansion) would not occur until after the effective date of the Act or amendment at issue, stating this argument "ignores the fact that defendant acquired *contract* rights at the time the parties entered the dealer agreement." *Id.* at 220, citing *In re Certified Questions*, 416 Mich at 573 (emphasis in original). The *Dale Baker* court concluded that the 1981 Act's termination provisions fell within this Court's rule that "retrospective application of a law is improper where the law 'creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past.'" 794 F2d at 220, quoting *In re Certified Questions* at 571. *See also*

Joe Dwyer, Inc v Jaguar Cars, Inc, 167 Mich App 672; 423 NW2d 311 (1988) (following *Dale Baker*).[10]

These decisions are consistent with those rendered by courts in other jurisdictions when faced with issues regarding the retroactive application of amendments to motor vehicle dealer acts. In virtually every case in which courts have been asked to determine whether amendments to state motor vehicle dealer laws can be applied retroactively, the courts have held that such amendments only apply prospectively. (*See* cases cited in Alliance of Automobile Manufacturer's *Amicus Curiae* Brief Supporting Leave to Appeal, pp. 10-11.) The Seventh Circuit reached this conclusion in considering whether an amendment enlarging the anti-encroachment RMA under the Illinois Motor Vehicle Franchise Act applied to a pre-existing

[10] The Eaton County Circuit Court has also held that the 2010 Amendment cannot apply retroactively to a pre-existing dealer agreement. *Champion Chrysler Jeep Dodge, LLC v Chrysler Group, LLC,* unpublished decision of the Eaton County Circuit Court, issued April 24, 2012 (Docket No. 10-1729-CZ) (attached as Exhibit A). The relevant facts of *Champion* are indistinguishable from those here and in *Kia Motors*: the plaintiff-dealer filed suit against Chrysler Group when it attempted to establish a like-line dealer at a site located outside the six-mile radius but within nine miles of plaintiff's location. Chrysler Group moved for summary disposition on the grounds that plaintiff lacked standing because the 2010 Amendment could not be applied retroactively. The court granted Chrysler Group's motion stating, "At the time the 2007 dealer agreement [with Champion] was entered into, the only limitation on Defendant's contractual right to establish additional dealerships was the six-mile RMA provided by the Dealer Act. To apply the 2010 Amendment to the 2007 dealer agreement between the parties would effectively give the parties new rights and duties that they had not bargained for. As stated in *Kia* [district court opinion], 'general precepts of contract law, however, indicate that courts should not, absent clear language and evidence of the intent of the parties, find that a contract incorporates future changes to the law. Rather, contracts are generally assumed to incorporate only law existing at the time the contract is made.'" (Champion Opinion, p. 4), quoting *Kia Motors America, Inc v Glassman Oldsmobile Saab Hyundai, Inc.*, unpublished decision of ED Mich, issued Jan. 23, 2012 (Docket No. 11-12090) (attached as Exhibit B).

The Court of Appeals granted plaintiff's delayed application for leave to appeal in that case, but then held the appeal in abeyance pending this Court's decision here. (October 31, 2013 Order of Court of Appeals in Case No. 312981.) Another case involving the same fact pattern, *Cueter Chrysler Jeep Dodge, LLC v Chrysler Group, LLC,* is pending in Washtenaw County Circuit Court (Case No. 10-1375-CZ).

contract between a manufacturer and dealer. In affirming the district court's dismissal of the dealer's complaint, the Seventh Circuit held that the Illinois amendment to the RMA could not be applied retroactively to divest the manufacturer's rights under its pre-existing dealer agreement to add dealers. *Ace Cycle World, Inc v Am Honda Motor Co, Inc*, 788 F2d 1225 (CA 7, 1986). *See also Eastgate Ford, Inc v Ford Motor Co*, unpublished opinion of Ohio Court of Appeals dated November 13, 1997, Docket No. 97APE05-670 (attached as Exhibit C); holding that a similar Ohio law provision regarding dealer challenges to expansion may only be applied prospectively; *Fireside Chrysler-Plymouth Mazda, Inc v Chrysler Corp*, 129 Ill App 3d 575, 580; 472 NE2d 861 (1984) ("the only way Fireside would have standing under the [Illinois Motor Vehicle Franchise] Act to prevent a competing dealership from being established in Buffalo Grove is if this court were to retroactively apply the 1983 amendment, which defines 'relevant market area' so as to broaden the scope of plaintiff's agreed on sales locality. Because such application would impair the vested contractual rights of the parties we decline to do so"); *Baker Chrysler-Jeep Dodge, Inc v Chrysler Group, LLC*, unpublished decision of New Jersey Motor Vehicle Franchise Comm'n, issued June 28, 2013 (attached as Exhibit D) (because Chrysler "established its intent to establish a franchise [by signing an LOI] prior to the May 4, 2011 amendments [expanding the 'relevant market area' from 8 to 14 miles] by taking various protective actions – over an extended period of time – to comply with the statute as it was then in effect, during the time period preceding the effective date of the amendment...Petitioner cannot retroactively avail itself of any statutory changes as contained in the amended statute in an effort to prohibit the establishment of the new franchise.")

This approach makes commercial sense. Manufacturers (and, frankly, dealers) require consistency and predictability. They need to know that the law in place when they embark on a

dealer expansion will remain in place during the relevant time period. Under the Court of Appeals' opinion, a manufacturer could enter into an LOI with a new dealer located outside the RMA of an existing dealer as the RMA was defined at the time the LOI was signed. That prospective new dealer could expand significant amounts of money and energy preparing for the expansion and beginning the project but if, the day before a dealer agreement is signed with the manufacturer, the legislature revised the RMA to now include the area in which the proposed new dealer is located, everything would grind to a halt. The prior dealer could file a protest, and the court would need to find good cause for the expansion. Manufacturers and dealers will likely not be willing to sign LOIs, or expend money and energy to act in accordance with an LOI, under these circumstances, with such uncertainty as to what law will apply at the end of the day and the possibility that their money and effort will have been wasted.

In sum, it is the existing LaFontaine Dodge Agreement between Chrysler Group and LaFontaine that grants a *non-exclusive right* to LaFontaine to purchase and sell Dodge vehicles and which expressly reserves to Chrysler Group the right to establish additional Dodge dealers "as [Chrysler Group] determines to be appropriate." Chrysler Group's unrestricted *contractual right* to establish additional Dodge dealers in LaFontaine's vicinity was limited only by the six-mile RMA law in effect in 2007 when Chrysler Group and LaFontaine entered into the Dodge Agreement. Thus, Chrysler entered into the LOI with IHS, which was appropriate under both the law and the contract in place at the time. The retroactive application of the nine-mile RMA enacted by the 2010 Amendment would clearly alter key aspects of the bargain between Chrysler Group and LaFontaine, and the bargain between Chrysler Group and IHS; grant new rights to LaFontaine; and impose new obligations on Chrysler Group. The Court of Appeals should be reversed.

C. The Statutory Amendment Cannot Be Classified as Remedial or Procedural.

There is an exception for the presumption against retroactivity when the amendment can be classified as remedial or procedural. "[S]tatutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested." *Lynch*, 468 Mich at 583 (quoting *Landgraf*, 511 US at 271). Remedial statutes "involve procedural rights or change the procedures for affecting a remedy. They do not, however, create substantive rights that had no prior existence in law or contract." *Dale Baker*, 794 F2d at 217. "Even if a new cause of action is not created, a statute may not be applied retroactively if it creates 'an important new legal burden'". *Brewer*, 486 Mich at 57 (holding that an amendment to the Worker's Compensation Act that extended the jurisdiction of the agency to out-of-state injuries suffered by Michigan residents where the contract for hire was made in Michigan, was substantive and therefore could not be applied retroactively because it imposed a new legal burden on out-of-state employers not previously subjected to the Agency's jurisdiction, and enlarged existing rights for Michigan residents injured out-of-state).

It should be obvious from all of the above that the enlargement of the RMA from six to nine miles effected by the 2010 Amendment is no mere procedural change; rather, it creates substantive rights in the dealer that had no prior existence in law or contract, and diminishes the manufacturer's existing rights. As the *Kia Motors* court noted in rejecting Glassman's argument that the remedial or procedural exception applied, "[b]efore the Amendment, the statute allowed Kia to establish a new dealer more than six miles from Glassman without restriction. After the Amendment, Kia must provide notice before doing so, and that notice allows Glassman to bring a declaratory judgment action to protest the new dealer. Clearly, the Amendment imposes a new substantive duty and provides a new substantive right that did not previously exist. Rather than

change the mechanics or time frame for objecting to a new dealer, the Amendment gives Glassman the substantive right to object. Therefore, it cannot be viewed as procedural, and the presumption against retroactivity applies." 706 F3d at 740. The same is true here, and the 2010 Amendment simply cannot be considered anything other than substantive.

For all of these reasons, the 2010 Amendment should not be applied retroactively to grant LaFontaine standing to challenge Chrysler's expansion of the Dodge product line to IHS.

III. THE COURT OF APPEALS' RETROACTIVE APPLICATION OF THE 2010 AMENDMENT DEPRIVES CHRYSLER GROUP OF CONSTITUTIONAL RIGHTS.

The retroactive application of the 2010 Amendment that results from the Court of Appeals' decision also divests Chrysler Group of contractual rights in violation of the United States and Michigan Constitutions, each of which prohibits any law that "impair[s] the Obligation of Contracts." U.S. Const. Art. I, §10; Mich. Const. Art. 1, §10. Under these provisions, statutory amendments may not retrospectively "diminish benefits" under existing contracts "without running afoul of constitutional prohibition[s] against impairment of a contract." *Campbell v Mich Judges Retirement Bd,* 378 Mich 169, 181; 143 NW2d 755 (1966); *see also City of Detroit v Walker*, 445 Mich 682, 698; 520 NW2d 135 (1994) ("the concern regarding the retroactivity of statues arises from constitutional due process principles that prevent retrospective laws from divesting rights to property or vested rights, or the impairment of contracts"); *Syntex Labs v Dep't of Treasury,* 233 Mich App 286, 292; 590 NW2d 612 (1998) ("due process principles prevent retrospective laws from...impairing contracts.")

When a constitutional challenge to a state law based on the contracts clause is made, the court asks " 'whether the change in state law has 'operated as a substantial impairment of a contractual relationship.'....This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the

impairment is substantial '" *General Motors Corp v Romein*, 503 US 181, 186; 112 S Ct 1105; 117 L Ed 2d 328 (1992) (cites and quotes omitted).

The Sixth Circuit in *Dale Baker Oldsmobile* agreed that the retrospective application of an amendment to the Dealer Act would raise serious constitutional questions under the respective Contracts Clauses of the United States and Michigan Constitutions. 794 F2d at 221; *see also Cloverdale Equip Co v Manitowoc Eng'ring Co,* 964 F Supp 1152, 1165 (ED Mich, 1997, *aff'd* 149 F3d 1182 (CA 6, 1998)) (an amendment imposing a "good faith" requirement to termination of a franchise agreement cannot be retroactively applied to existing franchisees, because "that retroactive application . . . violates the Contracts Clauses of the Constitutions of both the United States and the State of Michigan").

Here, it cannot be disputed that the parties have a contractual relationship, and, for all of the reasons set forth above, application of the 2010 Amendment impairs that relationship in a substantial manner. Therefore, even if Michigan law allowed for the retroactive application of the 2010 Amendment to the LaFontaine Dodge Agreement and the LOI, which it does not, such an application would nevertheless violate the United States and Michigan constitutions. This is yet another reason why the Court of Appeals' decision is erroneous and this Court should reverse.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Chrysler Group respectfully requests that this Court reverse the Court of Appeals' November 27, 2012 decision, and reinstate the Circuit Court order granting summary disposition to Defendants.

Dated: November 26, 2013

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: _____ P49921

Jill M. Wheaton (P49921)
2723 South State Street, Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

Thomas S. Bishoff (P53753)
400 Renaissance Center
Detroit, MI 48243
(313) 568-5341

OF COUNSEL:

Robert D. Cultice
WilmerHale
60 State St.
Boston, MA 02109
(617) 526-6000

Attorneys for Appellant Chrysler Group, LLC.

INDEX TO EXHIBITS

A. *Champion Chrysler Jeep Dodge, LLC v Chrysler Group LLC,* unpublished decision of Eaton County Circuit Court, issued April 24, 2012 (Docket No. 10-1729-CZ)

B. *Kia Motors America, Inc v Glassman Oldsmobile Saab Hyundai, Inc,* unpublished opinion of ED Mich, issued Jan 23, 2012 (Docket No. 11-12090), *aff'd*, 706 F3d 735 (CA 6, 2013)

C. *Eastgate Ford, Inc v Ford Motor Co*, unpublished, opinion of Ohio Court of Appeals issued Nov. 13, 1997 (Docket No. 97APE05-670)

D. *Baker Chrysler-Jeep Dodge, Inc v Chrysler Group, LLC*, unpublished decision of New Jersey Motor Vehicle Franchise Comm'n, issued June 28, 2013

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4-24-12

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

CHAMPION CHRYSLER JEEP DODGE, LLC, Plaintiff/Counter-Defendant,	File No. 10-1729-CZ
v	Hon. Calvin E. Osterhaven
CHRYSLER GROUP, LLC, Defendant/Counter-Plaintiff.	OPINION AND ORDER

At a session of said Court held in
the City of Charlotte,
County of Eaton, State of Michigan,
on this 24 day of April 2012

PRESENT: Honorable Calvin E. Osterhaven, Circuit Court Judge.

Defendant, Chrysler Group, LLC, filed a Motion for Summary Disposition pursuant to MCR 2.116 (C)(8) and (10) in this case where Plaintiff, Champion Chrysler Jeep Dodge, LLC, alleges Defendant violated Michigan's Regulation of Motor Vehicle Manufacturers, Distributors, Wholesalers and Dealers Act. Plaintiff filed a Brief in Opposition, and Defendant filed a Reply Brief. At a motion hearing held on April 10, 2012, this Court indicated that a written opinion would be issued. Because the viability of Plaintiff's Complaint depends on the impermissible retroactive application of the 2010 Amendment to the Dealer Act enlarging the RMA from six to nine miles, Defendant's Motion for Summary Disposition is GRANTED.

I. Statement of Facts

Michigan's Regulation of Motor Vehicle Manufacturers, Distributors, Wholesalers and Dealers Act ("Dealer Act")[1] includes regulations governing a manufacturer's establishment of an additional like-line dealer when an existing like-line dealer is present within the "relevant market area" ("RMA"). An amendment to the Dealer Act, effective August 4, 2010, among other things, enlarged the RMA from a six-mile radius to a nine-mile radius.[2]

[1] MCL 445.1561 *et seq*.
[2] MCL 445.1566(1).

Plaintiff filed suit against Defendant on December 17, 2010, claiming that Defendant violated the notice requirement of the Dealer Act when it attempted to establish another like-line dealer with Bill Snethkamp's Lansing Dodge, Inc., ("Snethkamp") by entering into a Letter of Intent to Add Vehicle Line signed on May 21, 2010. The Snethkamp dealership facility is located approximately seven mile away from Plaintiff's facility.

Defendant now seeks summary disposition, arguing that the viability of Plaintiff's Complaint depends on the retroactive application of the 2010 Amendment to the Dealer Act enlarging the RMA from six to nine miles, which was rejected as a matter of law in the recent cases *Kia Motors America, Inc, v Glassman Oldsmobile Saab Huyndai, Inc,*[3] and *LaFontaine Saline, Inc, v Chrysler Group, LLC.*[4] Plaintiff claims that it is not seeking retroactive application and that the cases cited by Defendant are distinguishable.

II. Standard of Review

A motion under MCR 2.116(C)(8) should only be granted if the claim is so clearly unenforceable that no factual development could justify the plaintiff's claim for relief.[5] Also, a court must accept as true all factual allegation contained in the complaint, as well as any reasonable inferences that may be drawn from those allegations.[6]

A motion under MCR 2.116(C)(10) should be granted if the evidence submitted by the parties fails to establish a genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.[7] The non-moving party must come forward with evidentiary proof to establish the existence of a genuine issue of material fact.[8]

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[3] *Kia Motors America, Inc, v Glassman Oldsmobile Saab Huyndai, Inc,* ____ F Supp.2d ____ (ED Mich, 2012) 2012 LEXIS 7346.
[4] *LaFontaine Saline, Inc, v Chrysler Group, LLC,* unpublished opinion of the Washtenaw County Circuit Court, issued September 16, 2011 (Docket No. 10-1329-CZ).
[5] *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999).
[6] *Singerman v Municipal Serv Bureau,* 455 Mich 135, 139; 565 NW2d 383 (1997).
[7] *Morales v Auto-Owners Ins Co,* 458 Mich 288, 294; 282 NW2d 776 (1998).
[8] MCR 2.116 (G)(4); *Smith v Globe Life Ins Co,* 460 Mich 446; 597 NW2d 28 (1999).

III. Analysis

In *Kia Motors America, Inc, v Glassman Oldsmobile Saab Huyndai, Inc,*[9] the Eastern District of Michigan granted a manufacturer's motion to dismiss on the ground that the 2010 Amendment to the Dealer Act enlarging the RMA from six to nine miles can only be applied prospectively and cannot be applied retroactively to a dealer agreement entered into before the 2010 Amendment went into effect. The *Kia* Court emphasized that Michigan law is "clearly-settled" that statutes and amendments to statutes are "presumed to operate prospectively unless the contrary intent is clearly manifested"[10] and this presumption "is especially true if retroactive application of a statute would impair vested rights [or] create [] new obligations and impose a new duty. . . ."[11]

Plaintiff's reliance on this case is well-founded as the case is generally analogous to the facts at hand. Similar to the parties in *Kia*, Plaintiff and Defendant entered into a dealer agreement before the effective date of the 2010 Amendment. Also, the 2007 dealer agreement between Plaintiff and Defendant contains essentially the same relevant and material contractual terms as the dealer agreement in *Kia* with respect to the manufacturer's right to establish additional dealers; each dealer was obligated to operate from a specific location; each dealer was granted a non-exclusive right to sell and service vehicles in designated sales area that could be changed by the manufacturer; and each manufacturer had the right to establish other like-line dealers in that sales area. These rights were only limited by the requirements of the Dealer Act, including, at that time, the six-mile RMA. Finally, neither the *Kia* dealer agreement nor the dealer agreement between the parties states that future changes in the law are to be incorporated into the agreement.

In response to Defendant's argument, Plaintiff takes the positions that the 2007 dealer agreement with Defendant is distinguishable from the *Kia* dealer agreement, and this Court should instead focus on the applicability of the 2010 Amendment on Defendant's Letter of Intent to Add Vehicle Line with Snethkamp signed on May 21, 2010. Plaintiff argues that the Letter of Intent is not a dealer agreement under the Dealer

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[9] *Kia Motors America, Inc, v Glassman Oldsmobile Saab Huyndai, Inc,* ____ F Supp 2d ____ (ED Mich, 2012) 2012 LEXIS 7346.
[10] *Id.* at *4 (citing *Frank W Lynch & Co v Flex Tech, Inc*; 463 Mich 578, 583; 624 NW2d 180 (2001) and quoting *Franks v White Pine Copper Div*, 422 Mich 636, 671; 375 NW2d 715 (1985)).
[11] *Id.* (quoting *Frank W Lynch & Co*, 463 Mich at 583).

Act, and any dealer agreement between Defendant and Snethkamp signed in the future would be subject to the 2010 Amendment. Additionally, Plaintiff argues that because the Plaintiff's "Sales Locality" is not defined or restricted to a particular mileage or radius in the 2007 dealer agreement between the parties, Defendant has no vested right with regard to a six-mile RMA.

Plaintiff's arguments are ultimately unpersuasive. At the time the 2007 dealer agreement was entered into, the only limitation on Defendant's contractual right to establish additional dealerships was the six-mile RMA provided by the Dealer Act. To apply the 2010 Amendment to the 2007 dealer agreement between the parties would effectively give the parties new rights and duties that they had not bargained for.[12] As stated in *Kia*, "[g]eneral precepts of contract law, however, indicate that courts should not, absent clear language and evidence of the intent of the parties, find that a contract incorporates future changes to the law. Rather, contracts are generally assumed to incorporate only law existing at the time the contract is made."[13] Because the viability of Plaintiff's Complaint depends on the impermissible retroactive application of the 2010 Amendment to the Dealer Act enlarging the RMA from six to nine miles, Defendant's Motion for Summary Disposition is GRANTED.

Due to this Court finding that the 2010 Amendment to the Dealer Act cannot be retroactively applied to the 2007 dealer agreement between the parties, analysis of *LaFontaine Saline, Inc, v Chrysler Group, LLC*,[14] is unnecessary as the issue of the applicability of the 2010 Amendment on Defendant's Letter of Intent to Add Vehicle Line with Snethkamp or subsequent dealer agreements between them is moot.

IT IS SO ORDERED.

HON. CALVIN E. OSTERHAVEN

[12] *See Dale Baker Oldsmobile v Flat Motors of N Am*, 794 F3d 213, 219 (CA 6, 1986).
[13] *Kia Motors America, Inc, v Glassman Oldsmobile Saab Hyundai, Inc*, ____ F Supp 2d ____, *7 (ED Mich, 2012) 2012 LEXIS 7346; *see Rutherford Farmers Coop v MTD Consumer Group, Inc*, 124 F App'x 918 (6 CA, 2005).
[14] *LaFontaine Saline, Inc, v Chrysler Group, LLC*, unpublished opinion of the Washtenaw County Circuit Court, issued September 16, 2011 (Docket No. 10-1329-CZ).

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Not Reported in F.Supp.2d, 2012 WL 175489 (E.D.Mich.)
(Cite as: 2012 WL 175489 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
KIA MOTORS AMERICA, INC., Plaintiff,
v.
GLASSMAN OLDSMOBILE SAAB HYUNDAI, INC., Defendant.

No. 11–12090.
Jan. 23, 2012.

Jonathan T. Walton, Jr., Walton & Donnelly, Detroit, MI, for Plaintiff.

Eric R. Bowden, Lawrence F. Raniszeski, Colombo & Colombo, Bloomfield Hills, MI, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM AND DENYING DEFENDANT'S MOTION TO DISMISS

ARTHUR J. TARNOW, Senior District Judge.

*1 Before the Court are Plaintiff's Motion to Dismiss Counterclaim and for Judgment on the Pleadings [13] and Defendant's Motion to Dismiss and for Judgment on the Pleadings [15]. This case concerns a franchise agreement between franchiser Kia Motors America, Inc. ("Kia") and franchisee Glassman Oldsmobile Saab Hyundai, Inc. ("Glassman") and application of the Michigan Motor Vehicle Dealers Act. Both parties move to dismiss and for judgment on the pleadings. The court heard argument on these motions at a hearing on January 18, 2012. For the reasons stated below, Kia's Motion to Dismiss and for Judgment on the Pleadings is GRANTED. Glassman's motions are DENIED.

I. Factual Background

A. The Sales and Service Agreement Between Kia and Glassman

Kia sells and distributes Kia brand vehicles, parts, and accessories. Kia also enters into franchise agreements with authorized dealers to sell Kia products. Kia's relationship with its authorized dealers is governed by a Sales and Services Agreement ("SSA"), which sets out a number of obligations for both parties. Kia entered into an SSA with Glassman on December 16, 1998.

Among other terms, the SSA authorizes a dealership to operate at a specific location or locations "and no others." The SSA states that each dealer's area of primary responsibility with regards to sales and marketing "may be altered or adjusted by [Kia] at any time." Further, the SSA states that no dealer has the "exclusive right" to sell in "any specified geographic area." Kia also "expressly reserves the unrestricted right ... to grant others the right to sell Kia products, whether or not in competition with [Glassman]." Finally, the SSA states that "[a]s permitted by applicable law, [Kia] may add new dealers, relocate dealers into or remove dealers from the APR [area of primary responsibility] assigned to [Glassman]." The SSA between Kia and Glassman authorizes Glassman to sell Kia products at a dealership in Southfield, Michigan.

B. Michigan Law at the time of the Franchise Contract

Michigan's Motor Vehicle Dealer Act ("the Act"), Mich. Comp. Laws § 445.1561, *et seq.*, regulates automobile dealers and the franchise relationship in a large number of ways. Most importantly to this case, the Act protects dealers from competition, both from the manufacturer and from new entrants to the local market. Specifically, the Act contains an "anti-encroachment" provision, which applies to a manufacturer or distributor such as Kia when said manufacturer wishes to establish a new dealer or relocate an existing dealer within the "relevant market area" of an already-existing dealer. Mich. Comp. Laws § 445.1576. Mich. Comp. Laws § 445.1566(a) (1998) defined the "relevant market area" as being within six miles [FN1] of an already-

existing dealer. If Kia wishes to establish a new dealer or relocate an already-existing dealer within the relevant market area of a pre-existing dealer, it is required to give notice to existing dealers. Already-existing dealers are then allowed thirty (30) days to file a declaratory action in state court to determine whether "good cause" exists for establishing a new dealership in the area. [FN2] This six-mile relevant market area was in place when Kia and Glassman entered into the SSA, and was the law from 1981 to 2010.[FN3]

> FN1. The range is variable based upon the population of the county. However, Oakland County is, and has been, well within the smaller relevant market area mile range based on its population of over 150,000 persons.
>
> FN2. The Act sets out various factors that constitute "good cause." None are relevant to this action.
>
> FN3. The Act was amended in 1983, 1998, 2000, and 2010. Only the 2010 amendment modified the relevant market area.

C. 2010 Amendment to the Michigan Law

**2 In 2010 the Michigan legislature amended the Act to enlarge the "relevant market area." The amendment, which amended the definition of "relevant market area," stated that it was intended "to become effective immediately," and took effect on August 4, 2010. 2010 Mich. Pub. Acts No. 139. The amended Act thus creates a "relevant market area" of nine (9) miles. Mich. Comp. Laws §§ 445 .1566(a); 445.1576.

D. Kia's Intent to Create a New Franchisee

On August 20, 2010 Kia verbally contacted Glassman to inform Glassman that it intended to establish a dealership in Troy, Michigan. Said dealership is intended to be located seven (7) miles from the Glassman dealership. Kia requested that Glassman "waive" his right under the Act to object to the new location. Glassman, by letter on August 23, 2010, refused. The parties agree that Kia has not sent the required notice under the Act, as Kia does not believe the anti-encroachment section of the Act applies to this case.[FN4]

> FN4. Glassman argues, in a single footnote, that by requesting that Glassman waive his right to object to the new placement, Kia has waived its right to object that the 2010 amendment to the Act applies to the contract between Kia and Glassman. This argument has no merit. Even if Kia's request is construed as conceding that the 2010 amendment applies, Kia is not legally bound by positions taken in informal (apparently verbal) communication.

II. Procedural History

Kia filed this action for declaratory relief on May 11, 2011, asking this Court to determine whether the 2010 amendment to the Act applies to Kia's intention to authorize a new Kia dealership. Glassman filed an Answer [7] and Counterclaim [8] on June 2, 2011, seeking declaratory relief. Kia's Motion to Dismiss and for Judgment on the Pleadings [13] was filed on July 22, 2011. Glassman's response and Counterclaim Motion to Dismiss and for Judgment on the Pleadings [15] were filed on September 12, 2011.

III. Analysis

A. Presumption that Statutes are Prospective

Under clearly-settled Michigan law, statutes and amendments to statutes are "presumed to operate prospectively unless the contrary intent is clearly manifested." *See, e.g., Frank W. Lynch & Co. v. Flex Tech., Inc.*, 463 Mich. 578, 624 N.W.2d 180, 182 (Mich.2001) (quoting *Franks v. White Pine Copper Div.*, 422 Mich. 636, 375 N.W.2d 715, 731 (Mich.1985)). This "is especially true if retroactive application of a statute would impair vested rights [or] create [ ] new obligations and impose a new duty...." *Id.* (quoting *Franks*, 375 N.W.2d at

371). The Michigan Supreme Court has interpreted the fact that the legislature includes no express language regarding retroactivity as demonstrating an intent that the law apply only prospectively. *See Frank W. Lynch,* 624 N.W.2d at 183. The Michigan Supreme Court has also noted that "the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively." *Id.; see also* 2007 Mich. Pub. Acts. No. 105 (stating that "[t]his amendatory act is curative and shall be retroactively applied ..."). Preventing unintended retroactivity is important "when a new statutory provisions affects contractual rights—an area 'in which predictability and stability are of prime importance.' " *Frank W. Lynch,* 624 N.W.2d at 184 (quoting *Landsgraf v. USI,* 511 U.S. 244, 271 (1994)).

*3 Kia argues that the 2010 amendment to the Act was not intended by the legislature to apply retroactively. Glassman conceded at oral argument that the amendment is silent with respect to any intention of retroactivity. Nevertheless, Glassman argues that the amendment's language that it takes "immediate effect" signals an intent that it apply retroactively. This language, however, is designed to avoid a provision of the Michigan Constitution that delays the effective date of new legislation unless the Legislature votes to give immediate effect to new legislation. *See* Mich. Const.1963, Art. IV, § 27. The Michigan Supreme Court has also acknowledged the difference between immediate effect and retroactivity. *See Pohutski v. City of Allen Park,* 465 Mich. 675, 641 N.W.2d 219, 234 (Mich.2002) (finding that a law "does not contain any language indicating it is meant to apply retroactively, but provides only that it is to take immediate effect").

The Sixth Circuit considered whether the Michigan Motor Vehicle Dealers Act applied retroactively to contracts executed before the Act's effective date in *Dale Baker Oldsmobile v. Fiat Motors of N. Am.,* 794 F.3d 213 (6th Cir.1986). In *Dale Baker,* the Plaintiff sought application of the newly-enacted Dealers Act to the termination of the franchise agreement between the dealer Defendant and the Plaintiff. The Act requires that, upon termination of any dealer agreement, the dealer must be paid fair and reasonable compensation by the manufacturer or distributor for new vehicles, supplies, and equipment purchased from the manufacturer or distributor. The court found that the Act created substantial new duties for manufacturers and gave substantive new rights to dealers; this, combined with a lack of explicit retroactivity, led the Sixth Circuit Court of Appeals to find that the Act applied only prospectively and not to contracts bargained for and agreed upon prior to the Act's 1981 enactment. *Id.* at 220–21.

Glassman argues that *Dale Baker* is distinguishable for two reasons: First, because the amendment is procedural and/or remedial in nature, rather than substantive, and thus constitutes an exception to the presumption against retroactivity. This argument is discussed in more detail below. Second, Glassman argues that *Dale Baker* involved the creation of an entirely new statute, rather than an amendment to a statute. Glassman offers no authority for the distinction that an amendment should be applied retroactively when a statute should be presumed to apply only prospectively, nor is the argument reasonable. Statutes are presumed to apply prospectively because, particularly with respect to contracts, retroactive application of a statute deprives parties of notice and the opportunity to bargain within the confines of existing law, and creates additional impairments on parties without the benefit of consideration.

The court finds this same reasoning applicable to amendments. The United States Court of Appeals for the Seventh Circuit considered precisely this issue in *Ace Cycle World, Inc. v. American Honda Motor Co.,* 788 F.2d 1225 (7th Cir.1986). In *Ace,* the court considered whether a 1983 amendment to the Illinois Motor Vehicle Franchise Act, modifying the relevant market area (just as in this case) should apply retroactively. The Seventh Circuit determined that the amendment should apply pro-

spectively only. 788 F.2d at 1228. The court finds this reasoning persuasive.

B. Exception if Law Procedural in Nature

*4 There is an exception to the presumption that statutes or amendments are not retroactive: when statutes are remedial or "have affected procedural rights or rights incident to substantive rights," and do not "create substantive rights that had no prior existence in law or contract." *Dale Baker,* 794 F.3d 213 at 217.

In *Dale Baker,* the Sixth Circuit determined that one particular section of the Act created substantive, rather than procedural, rights. The parties in *Dale Baker* had a franchise contract term that allowed for termination of the agreement with simple 30–day written notice. The Act created a new 60–day notice requirement as well as a showing of good cause for termination. The court found that this constituted a "substantive right" which gave new rights or duties to the franchisee, a right that had not been "bargained for." 794 F.3d at 219. Application of a new substantive right retroactively, the Court found, would likely violated the Contract Clause. As a contrast, the *Dale Baker* court presented the example of a statute which gave third party beneficiaries the right to sue directly to enforce a contract. Application of this statute retroactively was permissible because "the statute did not enlarge the duties of the defendant, but merely changed the method of enforcement." *Id.* (discussing *Guardian Depositors Corp. v. Brown,* 290 Mich. 433, 287 N.W. 798 (Mich.1939)).

Defendant argues that the expansion of the range of the relevant market area is similar to *Hansen–Snyder Co. v. Gen. Motors Corp.,* 371 Mich. 480, 124 N.W.2d 286 (Mich.1963). In *Hansen–Snyder,* the Michigan Supreme Court found that an amendment to the Mechanic's Lien Act extending the time to file a lien from 60 to 90 days was remedial in nature, and thus retroactive. Defendant argues that the extension of time to file a lien is similar to increasing the radius of the relevant market area in the Dealers Act, characterizing both as "merely increas[ing] that protection by fifty percent." The court rejects this strained reasoning. The extension of time to file a lien involves increasing the time to utilize an already-existing right; the extension is therefore remedial in nature. In contrast, without the 2010 amendment, Glassman would have no right to protest Kia's authorization of a new dealer. The amendment quite literally "enlarge[s] the duties" of Kia by expanding the "relevant market area" of Glassman's dealership. This would serve as a constraint on Kia's ability to authorize new dealers.

The court therefore finds that the 2010 amendment to the Michigan Motor Vehicle Dealers Act expanding the "relevant market area" from six to nine miles is substantive in nature, creating a new duty for manufacturers. The presumption against retroactivity applies.

C. Arguments Regarding Contract Terms

Glassman argues, as an alternative to retroactivity of the 2010 amendment, that the lack of a contractual term setting out a mileage restriction or definition of a "relevant market area" in the SSA restricts Kia's ability to authorize a new dealership. The court finds this argument without merit. The SSA references an "Area of Primary Responsibility" which tasks Glassman with selling and marketing within a specific area that "may be altered or adjusted" by Kia at any time. The SSA states that "[a]s permitted by applicable law, [Kia] may add new dealers to, relocated dealers into, or remove dealers from the APR assigned to [Glassman]." Essentially, Kia reserves to itself the right to authorize new dealers, except as prohibited by "applicable law."

*5 Glassman next argues that the term "applicable law" is meant to reference the law at whatever time the contract is read—essentially, that the contract is forward-looking and intentionally takes into account changes in the law. General precepts of contract law, however, indicate that courts should not, absent clear language and evidence of the intent of the parties, find that a contract incor-

porates future changes to the law. Rather, contracts are generally assumed to incorporate only law existing at the time the contract is made. The case most directly on point in is *Rutherford Farmers Coop. v. MTD Consumer Group, Inc.* ., 124 F. App'x 918 (6th Cir.2005), in which the court interpreted whether a contract clause that "[i]f any other state or federal law applies which directly contradicts any provision of this Agreement, said law shall be deemed part of the Agreement" represented a "clear expression that the contract [would] be amended by subsequent statutory enactments." 124 F. App'x at 920. The court, referencing Tennessee law and the general concept that contractual terms should be interpreted "with the same sense and meaning as the parties," found that the contract was not intended to take into account future changes in the law. *Id.* "Because [the provision at issue] does not refer to future laws, that clause, taken in its 'plain, ordinary, and popular sense,' incorporates only laws existing at the time of contract formation." *Id.* (quoting *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 405, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983) (contract incorporating future laws specifically stated that it incorporated "relevant present and future state and federal laws")). The Sixth Circuit found that "[s]ince the plain meaning [of the contract term] fails to support an agreement to be bound by future changes in the law, we will not infer one." 124 F. App'x at 920 (citing 11 Richard A. Lord, Williston on Contracts § 30:23 (4th ed. 2004) ("[C]hanges in the law subsequent to the execution of a contract are not deemed to become part of agreement unless its language clearly indicates such to have been intention of parties")); *see also Cummings, McGowan & West, Inc. v. Wirtgen Am.* ., *Inc.*, 160 F. App'x 458 (6th Cir.2005) (contract term severing any provision of contract that "may be prohibited by law" did not intend to incorporate future changes in Tennessee law, merely demonstrated parties' uncertainty about then-governing law).

Glassman advances the argument that the court cannot look the to pre–2010 version of the Michigan Auto Vehicle Dealers Act in interpreting the SSA because previous laws "cease to exist" when an amendment or subsequent statute is passed. *Lahti v. Fosterling*, 357 Mich. 578, 99 N.W.2d 490, 495 (Mich.1959). The court notes that, if said quote was treated literally, each and every amendment to a statute would apply retroactively, as no court would be ale to reference a past version of a statute. This is not *Lahti's* holding. In *Lahti,* the Michigan Supreme Court explicitly found that the amendment it was considering was remedial in nature, rather than substantive, as is the amendment at issue in the instant case. *Id.* at 494. The court in *Lahti* therefore found the amendment applied retroactively. Moreover, more recent cases from the Michigan Supreme Court case doubt on *Lahti's* broad language. *See, e.g., White v. Gen. Motors Corp.*, 431 Mich. 387, 429 N.W.2d 576, 580 (Mich.1988) (discussing *Lahti* and finding that substantive amendment to statute should be applied prospectively).

*6 Kia notes that, in 1998, when the parties bargained over and entered into the contract, it was with the understanding that the "applicable law" referenced was the six-mile relevant market area. Notably, Glassman acknowledges that "[w]here the parties entered into the SSA with the knowledge of this statutory restriction [referring to the 6–mile relevant market area] and took into consideration the limitation that 'applicable law' placed on its right, the parties clearly factored that into their negotiation of the SSA." Reply Br. of Def. at 2. As Glassman acknowledges, the parties bargained over each of the terms of the contract. Kia reserved for itself the right to authorize other dealers, and declaimed any responsibility to protect Glassman from competition within any proscribed geographic area, and also recognized the limitations placed on it by "applicable law." The parties did not clearly manifest an intent to incorporate future changes in the law into the contract. Thus, the court finds that the parties intended to take into account the law at the time the contract existed, but that Kia otherwise reserved all available legal power to create new deal-

erships absent limitation by the current law.

The court therefore declines to find that reference to "applicable law" constitutes an intention on the part of the parties that the contract will incorporate future changes in the law. Accordingly, the court finds that the "relevant market area" within which Glassman is accorded the right to object under Mich. Comp. Laws § 445.1576 is six miles.

D. Contract Clause

Kia argues, in the alternative, that application of the 2010 amendment would violate the Contract Clause of both the Michigan and United States Constitution. Because the 2010 amendment to the Michigan Motor Vehicle Dealers Act does not apply retrospectively, however, the court need not reach this question.

IV. Conclusion

As the new dealership that Kia seeks to authorize is outside of this relevant market area, the court finds that Kia need not give notice to Glassman of its intent to authorize a new dealership, that Glassman lacks the right to object according to Mich. Comp. Laws § 445.1576, and that the addition of a new dealership seven miles from the location of Glassman does not violate Glassman's statutory or contractual rights.

The Court being fully advised in the premises, and for the reasons stated above,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss and for Judgment on the Pleadings [15] is **DENIED.** Plaintiff's Motion to Dismiss and for Judgment on the Pleadings [13] is **GRANTED.**

All matters having been resolved by resolution of the instant motions, the case is closed.

SO ORDERED.

E.D.Mich.,2012.
Kia Motors America, Inc. v. Glassman Oldsmobile Saab Hyundai, Inc.

Not Reported in F.Supp.2d, 2012 WL 175489 (E.D.Mich.)

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C

Westlaw

Not Reported in N.E.2d, 1997 WL 710589 (Ohio App. 10 Dist.)
(Cite as: 1997 WL 710589 (Ohio App. 10 Dist.))

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Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
EASTGATE FORD, INC., Appellant,
v.
FORD MOTOR COMPANY, Appellee.

No. 97APE05-670.
Nov. 13, 1997.

APPEAL from the Franklin County Court of Common Pleas.
Whann & Associates, Keith E. Whann, Jay F. McKirahan, and Deanna L. Dedes, for appellant.

Baker & Hostetler, L.P.A., George W. Hairston, Elizabeth A. McNellie and Anthony J. Franze, for appellee.

DECISION

YOUNG, J.

*1 This matter is before this court upon the appeal of Eastgate Ford, Inc. ("Eastgate"), appellant, from the April 16, 1997 decision and entry of the Franklin County Court of Common Pleas, which dismissed appellant's R.C. 4517.50 protest for lack of subject matter jurisdiction.

The facts of this case are as follows: Eastgate and appellee, Ford Motor Company ("Ford"), entered into a sales and service agreement on May 5, 1976, whereby Eastgate became an authorized Ford dealer. Four years later, in 1980, R.C. 4517.50 was enacted as part of the Ohio Motor Vehicle Dealers Act ("Act"). It is undisputed that, prior to April 7, 1994, Jemautco, Inc. ("Jemautco"), owned one hundred percent interest in Eastgate. Jemautco is wholly owned by John E. Meyer, who is the Chairman/CEO of both Eastgate and Jemautco.

On April 7, 1994, Eastgate, Jemautco, John E. Meyer and Milo Noble, Jr., entered into a "Close Corporation Agreement" whereby Mr. Noble obtained a four percent interest in Eastgate. Prior to this agreement, Ford had made it clear that dealers needed to give Ford advance notification of any proposed change involving appointment of new owners or managers or a change in business entity. (See February 20, 1990 memorandum of J.P. Snook.)

According to appellant, the close corporation agreement further provided that the stock purchase plan should be approved so as to permit Mr. Noble to become the eventual owner of Eastgate, upon purchasing fifty-one percent of Eastgate's stock. Appellee contends that it was not a party to the close corporation agreement, and in any event, never approved this aspect of the agreement. On October 24, 1994, a "Supplemental Agreement" was executed to amend the parties' earlier "Sales and Service Agreement." This supplemental agreement reflects the fact that Mr. Noble now had a four percent ownership interest in Eastgate. (R. 34, exhibit E.) Likewise, a "Ford Rent-A-Car System Agreement" was also executed. It too reflects the fact that Mr. Noble now had a four percent ownership interest. (R. 34, exhibit E.) A review of the "Supplemental Agreement" and the "Ford Rent-A-Car System Agreement" demonstrates that there is no reference to, or provision for, Mr. Noble becoming the eventual owner of Eastgate.

In December 1995, appellee notified appellant of its plans to relocate Stenger Ford, Inc. Appellant contends that such relocation was within its relevant market area and, therefore, filed a protest pursuant to R.C. 4517.50(A). On January 26, 1996, appellee filed a motion to dismiss, arguing that the Motor Vehicle Dealers Board ("board") lacked subject matter jurisdiction to hear the protest. Appellee

argued that R.C. 4517.50 may not be applied retroactively to the franchise agreement, because it was executed prior to the effective date of the statute.

The board agreed and dismissed appellant's protest. Appellant appealed the board's decision to the court of common pleas pursuant to R.C. 119.12. The court of common pleas affirmed the decision of the board and this appeal followed.

*2 On appeal, appellant sets forth the following assignments of error:

"1. *ASSIGNMENT OF ERROR NO. 1:* THE COURT OF COMMON PLEAS SHOULD HAVE REVERSED THE DECISION OF THE MOTOR VEHICLE DEALERS BOARD BECAUSE THE BOARD'S DECISION WAS NOT SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE.

"2. *ASSIGNMENT OF ERROR NO. 2:* THE COURT OF COMMON PLEAS ERRED WHEN IT AFFIRMED THE DECISION OF THE MOTOR VEHICLE BOARD REGARDING THE BOARD'S JURISDICTION OVER EASTGATE'S PROTEST BECAUSE APPLICATION OF OHIO'S MOTOR VEHICLE STATUTE IS NOT RETROACTIVE AND THERE HAVE BEEN SUBSTANTIAL CHANGES TO THE ORIGINAL AGREEMENT SO AS TO BRING IT WITHIN THE TERMS OF THE STATUTE."

Appellant's assignments of error are interrelated and will be addressed together. In an administrative appeal brought pursuant to R.C. 119.12, the court of common pleas must affirm an order of an administrative agency if the order is supported by reliable, probative and substantial evidence, and is in accordance with law. R.C. 119.12; *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 407 N.E.2d 1265. On appeal to this court, this court's review is further limited to determining whether or not the trial court abused its discretion in its review of the agency's order. *Hartzog v. Ohio State Univ.* (1985), 27 Ohio App.3d 214, 500 N.E.2d 362; *Angelkovski v. Buckeye Potato Chips Co.* (1983), 11 Ohio App.3d 159, 463 N.E.2d 1280, paragraph three of the syllabus. On the question of whether the agency's order is in accordance with law, our review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 587 N.E.2d 835.

It is well established that R.C. 4517.50 may only be applied prospectively. *In re Kerry Ford, Inc.* (1995), 106 Ohio App.3d 643, 648, 666 N.E.2d 1157; *Hal Artz Lincoln-Mercury, Inc. v. The Ohio Motor Vehicle Dealers Board* (Feb. 27, 1997), Franklin App. Nos. 96APE02-247, 96APE02-248, 96APE04-478, unreported (1997 Opinions 491). See, also, *Men-Guer Chrysler-Plymouth, Inc. v. Chrysler Corp.* (S.D.Ohio 1994), Nos. 92-3923 and 92-3924, unreported, certiorari denied 513 U.S. 810, 115 S.Ct. 60, 130 L.Ed.2d 18 (Oct. 3, 1994). Thus, R.C. 4517.50 does not apply to the sales and service agreement that the parties originally entered into in 1976. Appellant, however, argues that the 1976 sales and service agreement was materially altered after the Act's enactment date due to the four percent ownership interest of Noble, and the proposed plan to permit Noble to become the eventual owner of Eastgate, upon the eventual purchase of fifty-one percent, or a majority, of the stock. Therefore, appellant argues that the agreement between the parties constitutes a new agreement which is subject to the Act, including R.C. 4517.50.

*3 Appellant argues that, if material or substantial changes in the agreement have occurred after the effective date of R.C. 4517.50, or if any amendments have occurred so as to give rise to what is essentially a "new" agreement, then the entire sales and service agreement may be brought within the terms of the Act, despite the fact that the original sales and service agreement predates the statute.

It is well established that minor modifications of a contract are not sufficient to warrant retroactive application of the Act. *Hal Artz, supra,* at 499; *Bitronics Sales Co., Inc. v. Microsemiconductor Corp.,* (4th D.Minn.) 610 F.Supp. 550.

Appellant cites *Northwest Lincoln-Mercury v. Lincoln Mercury Div. Ford Motor Co.* (1987), 158 Ill.App.3d 609, 110 Ill.Dec. 633, 511 N.E.2d 810, in support of its proposition that a transfer of ownership in stock constitutes such a material alteration. As noted by this court in *Hal Artz, supra,* the *Northwest Lincoln-Mercury* case involved an interpretation of the Illinois statute; not the Ohio statute. Moreover, that case involved a one hundred percent transfer of stock: a majority share of stock. In the instant action, a minority share of four percent of the stock has been transferred. For those reasons, we find *Northwest Lincoln-Mercury, supra,* to be distinguishable from the instant action.

This court is not persuaded that a four percent transfer of stock constitutes a material alteration such that it gives rise to a new agreement. It should be noted that in the *Hal Artz* case, this court rejected the argument that a thirty-nine percent transfer of ownership interest constituted a material alteration to the original agreement. Appellant's attempt to distinguish the *Hal Artz* case is not persuasive.

Moreover, no evidence was presented to demonstrate that appellee approved the provision of the close corporation agreement which sought to permit Mr. Noble to become the eventual owner of Eastgate, upon purchasing fifty-one percent of Eastgate's stock. In fact, a review of the close corporation agreement demonstrates that appellant recognized that appellee would have to approve such a change *at the time* that Mr. Noble acquired fifty-one percent. (Sections 5, 13, close corporation agreement.) This court further notes that the close corporation agreement contained several contingencies that Mr. Noble had to meet in order to eventually acquire this fifty-one percent share of stock. (Recitals, paragraph 3, close corporation agreement; section 13, close corporation agreement.) Thus, Mr. Noble's eventual ownership of a majority of stock in Eastgate is not a foregone conclusion. It remains to be seen whether Mr. Noble will ever own such a majority share; [FN1] and it remains to be seen whether appellee will approve of such a shift in ownership. Finally, a review of the amendment of the Ford sales and service agreement and Ford rent-a-car system agreement only reflects the fact that Mr. Noble had obtained a four percent interest in Eastgate. The amendment to these agreements does not make any reference to any other agreement regarding a change in ownership and does not incorporate and/or reference the close corporation agreement.

> FN1. Appellant concedes that the proposed eventual change in ownership is a *potential* change in ownership. (Appellant's brief at 5.)

***4** The board's decision that the above transfer of four percent of the stock did not constitute a material change sufficient to render the 1976 agreement a "new" agreement, is supported by reliable, probative and substantial evidence. What constitutes a material substantive alteration to an automobile dealer sales and service agreement, so as to create a "new" agreement that may be subject to R.C. 4517.50, is a question that is better left to the board's expertise. Accordingly, this court cannot find that Judge Miller abused her discretion in affirming the board's order dismissing this case for lack of subject matter jurisdiction.

For all of the above reasons, appellant's assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

LAZARUS and BOWMAN, JJ., concur.

Ohio App. 10 Dist.,1997.
Eastgate Ford, Inc. v. Ford Motor Co.
Not Reported in N.E.2d, 1997 WL 710589 (Ohio App. 10 Dist.)

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State of New Jersey
New Jersey Motor Vehicle Franchise Committee

IN THE MATTER OF:	:	**OAL DKT. NO. MFC 14475-11**
	:	**AGENCY DKT. NO. *N/A***
BAKER CHRYSLER-JEEP-DODGE, INC.,	:	
Petitioner,	:	
v.	:	**FINAL DECISION**
CHRYSLER GROUP, LLC,	:	
Respondent.	:	
and		
JAMES WEINER,	:	
Intervener/Respondent.	:	

The Motor Vehicle Franchise Committee (*hereinafter Committee*) hereby determines the matter concerning Petitioner's Protest against Respondents Chrysler Group, LLC's and James Weiner's (*hereinafter Respondents*) proposed establishment of a Chrysler-Jeep-Dodge franchise in Hightstown, New Jersey pursuant to N.J.S.A. 56:10-16 et seq.

Prior to this final determination, the Committee has reviewed and considered [1] Administrative Law Judge Tiffany M. Williams' Initial Decision Granting Summary Decision to the Respondents, [2] the Exceptions filed by counsel to Petitioner Baker Chrysler-Jeep-Dodge, Inc., [3] the Reply to said Exceptions filed by counsel for Respondents and [4] all pleadings, briefs and exhibits filed by the respective parties during the pendency of this matter at the Office of Administrative Law.

Based upon the record presented, the Committee concurs in the Administrative Law Judge's determination to dismiss Petitioner's Protest pursuant to N.J.S.A. 56:10-16, et seq. and in so doing, shall therefore affirm the recommendation of Judge Williams. The Administrative Law Judge's Findings of Fact and Conclusions of Law are accordingly adopted and therefore incorporated into this decision as if fully set forth at length herein.

[1] Factual Analysis and Conclusions by Administrative Law Judge

The Administrative Law Judge dismissed the Petitioner's Protest upon her determination that the Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction should be converted "to that of a Motion for Summary Decision." ***See*** Initial Decision at Page 6, Lines 11-12. The Administrative Law Judge stated that "In an administrative proceeding, matters of jurisdiction which impact the entire disposition of matter are appropriately handled through a summary decision proceeding." ***Id.*** at Lines 9-11. ***See*** also Matter of Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div. 1988) ("A contested matter can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law.").

Because Respondent Chrysler manifested its intent to establish a franchise prior to the May 4th, 2011 amendments by taking various protective actions -- *over an extended period of time* -- to comply with the statute as it was *then* in effect, during the time period preceding the effective date of the amendment on May 4th, 2011, Petitioner cannot retroactively avail itself of any statutory changes as contained in the amended statute, in an effort to prohibit the establishment of the new franchise. ***See*** Initial Decision at Page 2, Line 18 ***through*** Page 4, Line 18.

With respect to Respondent Chrysler entering into a Letter of Intent (LOI) with a prospective franchisee prior to the effective date of the amended statute, "The undisputed evidence clearly demonstrates that Chrysler committed itself with a LOI prior to the enactment of the amendment." *Id.* at Page 7, Lines 1-2. Additionally, the Administrative Law Judge rightly highlighted the importance of Respondent's even earlier manifestation of "intent" by recognizing that "In 2009, it was Chrysler that had the forethought to negotiate a waiver from the only dealership at the time who could potentially protest a Hightstown location." *Id.* at 11-12. (referring to the Waiver of Protest Rights executed by Dick Greenfield Dodge of Trenton).

Thus, the ongoing efforts by Respondent Chrysler to establish a new franchise (1) that began in mid 2009, (2) continued into 2010 and (3) went on throughout the Spring of 2011 culminating in an agreement with Respondent James Weiner clearly demonstrate the requisite establishment of intent -- *prior to the May 4th, 2011 amendment date* -- as envisioned by the relevant case law relied upon by the Administrative Law Judge.

Judge Williams therefore correctly concluded that Petitioner Baker was not protected by the May 4th, 2011 amendments to N.J.S.A. 56:10-16(f) which "increase(d) the size of the 'Relevant Market Area' from an 8 mile radius of the proposed new dealership to a 14 mile radius," thereby creating a potentially larger number of already existing franchisees with protest rights as to prospective disputes arising after May 4th, 2011. *Id.* at Page 5, Lines 19-20.

The Committee therefore concurs with the Administrative Law Judge's reliance and relevance placed on Seven M Corp. v. Kawasaki Motors Corp., 4 N.J.A.R. 346 (1983), the facts of which are in many ways strikingly similar to those presently before

this Committee. In Seven M, the manufacturer engaged in a series of ongoing actions both prior to and following the effective date of the very statute that is under scrutiny in the instant matter, beginning in 1980 and continuing through early 1983. In fact, the "approval and confirmation were orally transmitted and not formalized in a written agreement until late in December, 1982," more than two months after the effective date of the statute. ***Id.*** at 353. The court in Seven M placed emphasis on the establishment of the manufacturer's intent to establish a franchise in order to determine whether the new statute would be applicable: "The key word in the above portion of the act is 'intention.' The conduct of a franchisor that requires notice to an existing dealer is its '**intention**' to grant, relocate, reopen or reactivate a franchise. If Kawasaki acquired the **intention to relocate** the Pendine franchise **prior to the effective date of the act, then the act would not apply to that relocation. The facts support such a conclusion.**" ***Id.*** at 356-357 (*emphasis ours*).

Just as the Administrative Law Judge in Seven M appropriately concluded that the manufacturer established its intent to create a franchise prior to the effective date of a statutory change in a particular market area, so too was Judge Williams correct in her conclusion that Chrysler similarly had achieved a "continuum of the manifestation of its intent to establish a dealership in Hightstown" prior to the effective date of the statutory changes that became effective on May 4, 2011. ***See*** Initial Decision at Page 7, Lines 17-18.

"Once having arrived at the foregoing conclusion, all of the other collateral and successive questions need not be answered, because the franchisor's intention to relocate the . . . . franchise, and its concomitant approval, was not and thereafter cannot be governed by the act, which became effective months later. Therefore, the petition must be dismissed because the act does not apply retroactively to the transaction

described above. There need be no further proceedings in this matter, and the substantive issues also need not be determined." Seven M, *supra* at 357.

The Committee is satisfied that Administrative Law Judge Tiffany Williams' Legal Analysis and Conclusions are supported by the record and that her decision with respect to converting Respondent Chrysler's Motion to Dismiss Protest for Lack of Subject matter Jurisdiction to a Motion for Summary Decision was correct, as was her decision to grant said Motion and dismiss Petitioner's Protest.

[2] Exceptions Filed by Petitioner Baker

Counsel for Petitioner has set forth three exceptions to the Initial Decision, as follows:

[1] Resolution of Petitioner Baker's Protest by way of Summary Judgment was inappropriate, as questions of intent require analysis of testimony and cross-examination;

[2] Chrysler should be stopped from asserting that Petitioner Baker lacked standing. Alternatively, in providing notice to Baker under the Amended Act, Chrysler waived its argument as to 'standing'; *and*

[3] Genuine issues of material fact relating to when Chrysler formed the requisite intent to open the Hightstown dealership should have precluded summary disposition of Baker's Protest.

With respect to Petitioner's first Exception, same is without merit. Although Petitioner understandably seeks to focus attention on the summary judgment standards, the procedural reality is that there is a distinction between a motion for summary judgment versus a motion to dismiss based upon a lack of subject matter jurisdiction pursuant to New Jersey Court Rule 4:6-2(a), which was addressed by the Appellate Division in Hoffman v. Supplements Togo Mgt., 419 N.J. Super. 596, 611 (App. Div. 2011):

> The trial court appropriately considered, with respect to the motion to dismiss for lack of subject matter jurisdiction under Rule 4:6-2(a), matters outside the pleadings, without converting that specific application to a summary judgment motion. Cf. R. 4:6-2(e) (requiring such conversion only for motions to dismiss for failure to state a claim under subsection (e) of the Rule).

Id. at 611.

It was within this context, as previously noted in this Committee's Final Decision, that Judge Williams determined that a sound basis existed to convert this matter to one ripe for Summary Decision. ***See*** Final Decision, *supra*, at Page 2, Lines 6-16. Coupled with Respondent Chrysler's longstanding manifestation of intent to establish a dealership in Hightstown (***See*** Final Decision at Page 2, Line 17 through Page 4, Line 21), the Committee must reject the first Exception as being without merit.

As to Petitioner's second Exception, this too is devoid of merit. In her Initial Decision, Judge Williams correctly stated that "It is axiomatic that 'courts will not entertain matters in which plaintiffs do not have sufficient legal standing.' New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 409 (App. Div. 1997)." ***See*** Initial Decision at Page 6, Lines 7-9.

Because Petitioner Baker was not within the applicable "Relevant Market Area" of eight (8) miles as required by the statute in effect at the time that Chrysler's "intent to open a new franchise" was first established, which was prior to the amendments of May 4th, 2011, Petitioner lacks the standing necessary for the matter to be substantively adjudicated, a threshold consideration that our courts have consistently relied upon when analyzing such issues. ***See:*** W & D Imports, Inc. v. American Honda Motor Co. Inc., 2008 N.J. Super. Unpub. LEXIS 274 at Page 2, n.2 (App. Div. 2008) ("To have standing as an objector, and to be entitled to notice of a proposed new franchise, an existing franchisee must be located within a certain defined distance of the proposed new franchised dealership. *See* N.J.S.A. 56:10-19; N.J.S.A. 56:10-16f"); Gilbert v. Gladden, 87 N.J. 275, 280-281 (1981) (". . . . the issue of whether subject matter

jurisdiction exists . . . . Involves merely a threshold determination as to whether the Court is legally authorized to decide the question presented. If the answer to this question is in the negative, consideration of the cause is 'wholly and immediately foreclosed.'" See Baker v. Carr, 369 U.S. 186, 198, 82 S.Ct. 691, 699, 7 L.Ed. 2d 663, 674 (1962).); In re Baby T., 160 N.J. 332, 340 (1999) (A lack of standing by a plaintiff precludes a court from entertaining any of the substantive issues presented for determination.).

As to the 'alternative' component of Petitioner's Second Exception in which it is claimed that "Chrysler waived its standing argument," this too is meritless. In Garden State Ford, Inc. v. Ford Motor Company, Inc., OAL Dkt. No. MFC 4266-83 (September 21, 1983), at Page 14, Administrative Law Judge Samuels was confronted with a similar post-effective-date of the statute's notice situation, where Ford Motor Company opted to provide the written 90 day statutory notice to the existing franchise, notwithstanding its position that 'intent' had previously been established with respect to the establishment of a new franchise, prior to the effective date of the Motor Vehicle Franchise Statutes. Judge Samuels held:

> The 90 day notice under the Act, that was given to Garden State Ford in May 1983 by the Ford Motor Company, was an act of anticipatory carefulness that does not alter the jurisdictional status of the matter, and it does not act as a waiver of a known right.
>
> *Id.*

The 'notice' that was deemed as an act of anticipatory carefulness in Garden State was also present in Seven M, *supra* at 356: "With some degree of embarrassment, Kawasaki argues that it attempted to obtain a waiver from Seven M in order to avoid the trouble and expense of litigation, even though they felt that a protest on the part of Seven M would not succeed." Kawasaki's post-effective-date 90 day notice was not deemed to constitute any type of waiver of a known right or jurisdictional status.

Clearly, the issue termed an "act of anticipatory carefulness" is not unique in situations as the one presently before this Committee and just as it was long ago recognized that such an action could not alter jurisdictional status or be construed as a waiver of a right, Respondent Chrysler's 90 Day Notice Letter is similarly nothing more than an act of anticipatory carefulness. Thus, Petitioner's Second Exception claiming waiver is without sound basis and is accordingly rejected by this Committee.

Finally, with respect to the Third Exception articulated by the Petitioner, the issue of Respondent Chrysler's "intent" is once again raised by the Petitioner. For all of the reasons contained in the Initial Decision of Judge Williams as to subject matter jurisdiction and the establishment of intent, as affirmed by this Committee in the instant Final Decision, the Third Exception is hereby rejected as without merit.

One aspect of the Petitioner's Third Exception, however, is worth briefly noting. Petitioner contends that at the time that a manufacturer first develops the requisite intent, it is "then obligated to provide notice to existing dealers" at *that* particular time (**See** Petitioner's Letter Memorandum at Page 9, Lines 1-2) and concludes that "Under Chrysler's interpretation, which was adopted by the Court in its Initial Decision, Chrysler could have waited years to actually provide notice to existing dealers." *Id.* at Lines 7-8. Based solely on the case law cited to and relied upon by Judge Williams and this Committee, in conjunction with the plain language of the statute, the franchisor's intent must be provided "not less than 90 days' advance written notice of its intention to grant, relocate, reopen or reactivate a franchise of the same line make or establish, relocate, reopen or reactivate a business." N.J.S.A. 56:10-16. The franchisee is protected because there is more than ample time to review, assess and if so desired, file a protest; *however*, as the case law reflects, a franchisor's establishment of "intent" to proceed with a new franchise at some prospective point in the future does not necessitate that the "not less than 90 days' notice advance written notice" must be

provided at that very first moment of intent. *Rather*, the "not less than 90 days' advance written notice" contemplated by the statute concerns the time period prior to the anticipated physical establishment of the new franchise.

Finally, as to Petitioner's contentions that there are "unique circumstances of this case," the Committee disagrees. As the relevant case law contained in both the Initial Decision and the instant Final Decision reflects, as also cited by the parties, this situation was first addressed thirty years ago in the Seven M and Garden State Ford decisions, respectively. There is nothing "unique" in the situation that was adjudicated by Judge Williams and now before this Committee, except perhaps the amendments to the original statute addressing the award of attorney's fees and costs to the prevailing party. But for the changes to N.J.S.A. 56:10-24 subsequent to the two aforementioned decisions in 1987, this Committee would have explored the applicability and appropriateness of awarding litigation costs, reasonable attorney's fees and/or administrative hearing costs to the prevailing party, just as the Court and Committee did in said prior matters. Since, however, the amendments to the statute presently preclude such awards, unlike the costs contemplated and awarded in both Seven M and Garden State Ford, no costs can be recommended by this Committee or awarded by the Administrative Law Judge.

The Committee is satisfied that the issues raised in Petitioner Baker's Exceptions are without merit, and that same were briefed at length in post-Hearing submissions that were filed with the Committee, as were all of Petitioner's contentions that were thoroughly briefed and submitted to Judge Williams. All such submissions were properly considered and correctly rejected in the determination of this matter. The applicable legal standard relevant to Petitioner's Exceptions is "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole." Close v. Kordulak Bros., 44 N.J. 589,

599 (1965); Sager v. O.A. Peterson Const. Co., 182 N.J. 156, 163-164 (2004). Judging the record as a whole, the Committee finds sufficient credible evidence in the record to support the Administrative Law Judge's legal analysis and conclusions.

It is, therefore, on this 28th **day of** June **, 2013:**

ORDERED that Petitioner Baker's Protest against Respondents Chrysler Group and James Weiner be, and is hereby **DISMISSED**; *and it is further*

ORDERED that the Administrative Law Judge's recommendations as contained in her Initial Decision are hereby **AFFIRMED.**

For the Motor Vehicle Franchise Committee

Raymond P. Martinez, Chairman